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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 943

LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, - - - - - Petitioner,

versus

CURTIS SHIPP and BERNICE SHIPP, - Respondents.

BRIEF IN OPPOSITION.

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SUBJECT INDEX.

	PAGE
A. Statement of Questions Presented	ii
B. Statement of the Case	1–3
C. Argument	3–8
D. Conclusion	9

STATEMENT OF QUESTIONS PRESENTED.

1. Is the Judgment of the Kentucky Court of Appeals supported by an independent and adequate state ground thus depriving the Supreme Court of the United States of jurisdiction?

2. Is the Judgment of the Kentucky Court of Appeals, in any way, contrary to the decision in Griggs v. Allegheny County 369 U. S. 584?

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v.

CURTIS SHIPP and BERNICE SHIPP, - *Respondents.*

BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

The petitioner, Louisville and Jefferson County Air Board, claims to have acquired an air easement by prescription which entitles it to cut down two (2) trees belonging to the respondents, Curtis Shipp and Bernice Shipp, his wife, without compensation.

The statement of the case by the petitioner is essentially correct, as most of the facts were stipulated; however, there was evidence introduced by the respondents not referred to in the petitioner's Statement of the Case, and in order to bring it to the Court's attention in its proper context the respondents will briefly summarize the case.

The trees are pin oaks standing 50.9 and 39.7 feet high. They shade the back of the house, part of the

roof, the outside patio, the rear yard and make the premises cooler, more beautiful and in general a more pleasant, desirable and valuable place to live.

The trees are situated approximately 1400 feet North of the end of Runway 19 and approximately 600 feet West of the center line of said Runway, if extended.

In late 1966 or early 1967 VASI equipment costing approximately $50,000.00 was installed at the airport for the purpose of controlling the altitude of approaching planes. The Federal Aviation Agency will not permit the use of said equipment unless the trees are cut down into the clear zone which would mean that approximately 25 feet or one-half of the taller tree would have to be removed and fifteen feet of the shorter tree would have to be removed. In all probability this would kill both of the trees. Pin oaks grow at the rate of one or one and one-half feet per year in Kentucky.

Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights.

Although aircraft have been taking off and landing at Standiford Air Field for more than fifteen (15) years they have never flown over the trees in question while so doing. The reason for this is that the trees are 600 feet West of the center line of the runway at a point only 1400 feet North of the end of the runway (R. 9-12). The evidence omitted by the petitioner in

its statement of the case and never denied by the petitioner is that the planes have never flown within 250 feet of the trees in taking off and never flown closer than 300 feet during landings. The planes were also at least 150 feet above the ground while taking off and 200 feet above the ground when landing (R. 28-29).

The Kentucky Court of Appeals decided that the Air Board had not exercised adverse rights in the space involved for fifteen (15) years; that the trees had exceeded the 20 foot elevation objected to before the commencement of the use of VASI equipment and before the adoption of rules and regulations applying thereto; that the appellants' right to maintain their trees was acquired before the rights of the Air Board was fixed by law; that appellants' rights are protected by the Constitution and cannot be taken away except by condemnation under Kentucky Revised Statutes 183.133 (4) and (5) (R. 49-50).

ARGUMENT.

A. The Judgment Sought to be Reviewed is Supported by an Independent and Adequate State Ground, Thus Depriving the United States Supreme Court of Jurisdiction.

This case involves the same principal of law which was applied in Jankovish v. Indiana Toll Road Comm., 379 U. S. 487. The Court of Appeals of Indiana had held that the airport zoning regulations were unlawful and unconstitutional because they permitted appropriation of property rights without payment of compen-

sation. The Supreme Court of the United States granted a writ of *certiorari* because it appeared that the case presented questions affecting the National Airport Plan not previously considered. The Court, after hearing the arguments, dismissed the writ of *certiorari* holding:

> "It is undoubtedly the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

It is respondents' contention that the judgment sought to be reviewed is supported by an independent and adquate state ground. A brief review reveals this to be the case.

The petitioner has a license to fly its planes in the manner in which it has been doing. In order to increase the licensed privileges into prescriptive rights he must go further and abuse the license thus breaching some duty owed to the landowner so as to give rise to a cause of action. Jackey v. Burkhead, Ky., 341 S. W. 2d 64, held:

> "In order to establish title to an easement by prescription, the adverse possession must be actual, open, notorious, forcible, exclusive and hostile and must continue in full force for at least 15 years, but where the use of a way is permissive, no prescriptive right to it is acquired, although it may have been used by the public for 15 years or more."

The cases involving aircraft usually state that the break line as to where compensable damages exists is time when trespass flights become so intolerable as to create such substantial interference as to constitute taking or incipient taking. U. S. v. 3276.21 Acres of Land (DC Cal.), 222 F. Supp. 887.

The Air Board alleges that the maximum elevation for the trees should be 20 feet. Inasmuch as the largest tree is over 50 feet in height and has been growing at the rate of 1 or 1½ feet per year, it is obvious that it has been in the alleged forbidden air space continuously for 20 to 30 years. If there are any prescriptive easements to air space involved in this case, they belong to the owners of the trees by virtue of them occupying the space for the last 20 to 30 years. The only use of this space by the Air Board has not been by airplanes, it was by the light rays emitted by the newly installed VASI equipment, which precipitated this action.

The reasons given by the Court of Appeals in its decision are all state grounds and are as follows:

> "The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; however, it appears that in the instant case, the trees had exceeded the 20-foot elevation objected to before the commencement of the use of VASI quipment and before the adoption of rules and regulations applying thereto.
>
> "Appellants' right to maintain and enjoy their trees was acquired before the right of the Air Board was fixed by law. Although appellants'

> right was not in conformity with the zoning rules of K.A.Z.C., nevertheless, such right is protected by the Constitution and may not be taken except by condemnation under K.R.S. 183.133 (4) and (5)" (R. 49-50).

To this day the planes have never interfered with the trees and the trees have never interfered with the planes. The real reason that the petitioner wants the trees removed is that they interfere with their VASI equipment which was not installed until 1967.

Petitioner is trying to enlarge on its approaching rights of take-offs and landings to include an entirely new, larger and different purpose, that being the VASI equipment.

The law of Kentucky and most States is well expressed in 25 Am. Jur. 2d Easements and Licenses, Section 84 which provides:

> "The character and extent of a prescriptive easement are fixed and determined by the user under which it was acquired. No different or materially greater use can be made of such an easement, except by further adverse user for the prescriptive period, or by the acquisition of additional rights in some other manner."

These are all valid state grounds abundantly adequate and independent of any federal law and violating none.

B. The Judgment Sought to be Reviewed is in no Way Contrary to Griggs v. Allegheny County, 369 U. S. 84.

The only jurisdictional reason given in the petition that the Court should review this matter is that the decision is not in accordance with Griggs v. Allegheny County, 369 U. S. 84. In that case the planes were flying as close as 30 to 50 feet over the residence and the facts were summarized as follows:

> "Regular and almost continuous daily flights often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.' "

The Court rightfully held under those facts that the airport had in effect condemned an easement and should therefore pay compensation. If such condi-

tions prevailed and continued for a period of fifteen years in Kentucky, it might very well be argued that the airport's rights ripened and they acquired an easement by prescription—but such is not the case. The facts in this case are not only distinguishable they are even antithetical. Stipulation No. 12 (R. 11) provides:

> "Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights."

Petitioner makes much of the fact that the airport is the proper Agency to bring the action under Griggs v. Allegheny County, Respondents have no quarrel with this and have never made it an issue and thus find it ungermane.

The Kentucky Court of Appeals did no violence or harm to the decision as it is not applicable to this case.

The Allegheny case alluded to U. S. v. Causby, 328 U. S. 256 in saying that:

> "The use of land presupposes the use of some of the airspace above it. 328 U. S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."

CONCLUSION.

Although this case is important to the parties it does not present any unique or novel principles of law at this time. The case was thoughtfully decided on well settled state laws none of which are contrary to the federal law.

The petitioner has an adequate remedy under state law of condemnation. This is a powerful weapon and is harsh in its effect. The respondents do not look forward to it but to deprive them of their shade trees without any compensation whatsoever would be worse. The petitioner is seeking all the benefits of condemnation without exercising the correlative duty of paying just compensation. The compensation would in no way reimburse respondents for the personal importance they attach to the trees or for their costs in protecting their rights in the trees.

The law, the equities and the feelings are on the side of the respondents. There is no valid reason why the Judgment of the Court of Appeals of Kentucky should be disturbed. If God makes a tree grow then petitioner can pay for respondents' trees it wishes to cut down. It is for these reasons as well as those advanced in the argument that we respectfully request the petition for writ of *certiorari* to be dismissed.

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